

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Grant Johnson,

Complainant,

**PROBABLE CAUSE ORDER**

v.

Ron Erhardt and the Ron Erhardt  
Volunteer Committee,

Respondents.

The above-entitled matter came on for a probable cause hearing before Administrative Law Judge (ALJ) Jeanne M. Cochran on October 12, 2012. This matter was convened to consider a campaign complaint filed under the Fair Campaign Practices Act by Grant Johnson on October 4, 2012. The probable cause hearing was conducted by telephone conference call. The probable cause record closed at the conclusion of the hearing on October 12, 2012.

Grant Johnson (Complainant) appeared on his own behalf without counsel. Ron Erhardt appeared on his own behalf without counsel. Michael A. Posnick, Attorney at Law, appeared on behalf of Mr. Erhardt's campaign committee, the Ron Erhardt Volunteer Committee.

Based upon the record and all the proceedings in this matter, and for the reasons set forth in the attached Memorandum incorporated herein, the Administrative Law Judge makes the following:

**ORDER**

**IT IS HEREBY ORDERED THAT:**

1. There is probable cause to believe that Respondents Ron Erhardt and the Ron Erhardt Volunteer Committee violated Minnesota Statutes § 211B.03 in connection with Mr. Erhardt's campaign for the Minnesota House of Representatives District 49A seat.

2. This matter is referred to the Chief Administrative Law Judge for assignment to a panel of three Administrative Law Judges, pursuant to Minnesota Statutes § 211B.35.

3. Should the Parties decide that this matter may be submitted to the assigned Panel of Judges based on this Order and the record created at the Probable Cause hearing, without an evidentiary hearing, they should notify the undersigned Administrative Law Judge by **12:00 p.m. on Monday, October 22, 2012**. If both Parties do not agree to waive their right to an evidentiary hearing, this matter will be scheduled for an evidentiary hearing in the near future.

Dated: October 16, 2012

s/Jeanne M. Cochran  
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JEANNE M. COCHRAN  
Administrative Law Judge

### MEMORANDUM

Respondent Ron Erhardt is a candidate for the newly redistricted Minnesota House of Representatives seat in District 49A. Mr. Erhardt represented a majority of this district in the Minnesota House for nine terms as a Republican beginning in 1991. In 2008, he lost his bid for re-election to Keith Downey. Mr. Erhardt's opponent in the November 6, 2012, election is Republican endorsed candidate Bill Glahn.<sup>1</sup> Neither Mr. Erhardt nor Mr. Glahn are incumbents.

The Complaint alleges that that Mr. Erhardt violated Minn. Stat. § 211B.03 by using the phrase "Re-Elect" on his campaign lawn signs when he is not the incumbent candidate for the office. The lawn signs state:

Re-elect Ron  
Erhardt  
Edina's Representative  
[www.ronerhardt.com](http://www.ronerhardt.com)

By Order dated October 9, 2012, the Administrative Law Judge found that the Complaint set forth sufficient facts to support finding a *prima facie* violation of Minn. Stat. § 211B.03. A probable cause hearing was held on October 12, 2012.

### Legal Standard

The purpose of a probable cause determination is to determine whether, given the facts disclosed by the record, it is fair and reasonable to hear the matter on the merits.<sup>2</sup> If the judge is satisfied that the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict, a motion to

<sup>1</sup> Mr. Downey, the incumbent, is not seeking reelection to the Minnesota House of Representatives and is instead running for the Minnesota Senate District 49 seat.

<sup>2</sup> *State v. Florence*, 239 N.W.2d 892, 902 (Minn. 1976).

dismiss for lack of probable cause should be denied.<sup>3</sup> A judge's function at a probable cause hearing does not extend to an assessment of the relative credibility of conflicting testimony. As applied to these proceedings, a probable cause hearing is not a preview or a mini-version of a hearing on the merits; its function is simply to determine whether the facts available establish a reasonable belief that the Respondent has committed a violation. At a hearing on the merits, a panel has the benefit of a more fully developed record and the ability to make credibility determinations in evaluating whether a violation has been proved, considering the record as a whole and the applicable evidentiary burdens and standards.

### **Minnesota Statutes § 211B.03 (Use of the Term Reelect)**

Minn. Stat. § 211B.03, states:

A person or candidate may not, in the event of redistricting, use the term "reelect" in a campaign for elective office unless the candidate is the incumbent of that office and the office represents any part of the new district.

### **Arguments and Analysis**

The Complainant, Mr. Johnson, argues that Mr. Erhardt has campaign lawn signs that use the term "Re-elect" in violation of Section 211B.03. The Complaint asserts that the campaign lawn signs posted in the district promoting Mr. Erhardt's candidacy appear to be from Mr. Erhardt's prior campaigns for re-election. The Complaint states that, while the prefix "Re" is covered on some of the signs so that only the word "elect" is visible, other signs have not been altered and clearly state "Re-elect Ron Erhardt." The Complainant attached photos of two campaign signs posted in the district that did not have the prefix "Re" or the word "Re-elect" covered up.<sup>4</sup>

At the probable cause hearing, the Complainant testified that he took the photographs of the Erhardt campaign using the term "Re-elect" on September 27, 2012. He stated that one of the signs he photographed was located at 4413 West 70<sup>th</sup> Street and the other was located on Valleyview Road, across from Valleyview Middle School. He further stated that these are prominent locations in Edina.

In response, Mr. Erhardt testified that he and his campaign committee decided to re-use his old campaign signs in an effort to save money but did not intend to violate the

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<sup>3</sup> *Id.* at 903. In civil cases, a motion for a directed verdict presents a question of law regarding the sufficiency of the evidence to raise a fact question. The judge must view all the evidence presented in the light most favorable to the adverse party and resolve all issues of credibility in the adverse party's favor. See, e.g., Minn. R. Civ. P. 50.01; *LeBeau v. Buchanan*, 236 N.W.2d 789, 791 (Minn. 1975); *Midland National Bank v. Perranoski*, 299 N.W.2d 404, 409 (Minn. 1980). The standard for a directed verdict in civil cases is not significantly different from the standard for summary judgment. *Howie v. Thomas*, 514 N.W.2d 822 (Minn. App. 1994).

<sup>4</sup> Exhibit 1, Attachments 1-G and 1-H.

law. Mr. Posnick, a member of the “Ron Erhardt Volunteer Committee,” testified that the campaign committee covered up the “Re” in “Re-elect” on each of the old campaign signs using one of two methods: 1) coloring in the “Re-” with matching blue indelible ink; or 2) putting blue duct tape over the “Re-” prefix. Mr. Posnick introduced an affidavit from Mr. George Crolick, co-chair of the Ron Erhardt Volunteer Committee, detailing the steps the campaign committee undertook to cover the prefix on the signs so that the signs read “elect,” not “Re-elect.”<sup>5</sup>

Mr. Posnick stated that he cannot deny that the two signs photographed by Mr. Johnson have the term “Re-elect” showing. He stated he does not know how the “Re” on the signs became uncovered. He further testified that until the time of the probable cause hearing, the campaign committee was not sure where the signs pictured in the Complaint were located. He also stated that the committee did not know that there were any campaign signs showing the “re-elect” language until October 9, 2012, when Mr. Erhardt received the Notice of Determination of Prima Facie Violation and Notice and Order for Probable Cause Hearing. Mr. Posnick testified that the campaign committee has undertaken diligent efforts since that date to find and correct any Erhardt campaign signs that show the “Re-” in “Re-elect.” He also testified that they have corrected the two signs referenced in the Complaint with blue duct tape. Similarly, Mr. Erhardt testified that when they found out there was a problem with the signs, they corrected them.

Mr. Erhardt and his campaign committee argue that the Complaint should be dismissed for two reasons. First, they argue that they did not intend to violate the statute. This argument fails as a matter of law. There is no element of intent in Minn. Stat. § 211B.03. The statute strictly forbids the use of the term “reelect” in the election following re-districting unless the candidate is an incumbent for a seat that previously covered at least part of the district. Minn. Stat. § 211B.03.

Second, they argue the Complaint should be dismissed because the violations are “frivolous.” Following the probable cause hearing, the Administrative Law Judge may determine that a complaint is frivolous and dismiss it.<sup>6</sup> A frivolous claim is one that is without any reasonable basis in law or equity and could not be supported by a good faith argument as a modification or reversal of existing law.<sup>7</sup> In this matter, the Administrative Law Judge finds that the Complaint is not frivolous. It is supported by a good faith argument and has a sufficient basis in the law to survive both prima facie and probable cause review. The statute only allows use of the term “reelect” where the candidate is the incumbent and represents part of the new district. Minn. Stat. § 211B.03. Mr. Erhardt is not the incumbent in any part of the new district. Thus, neither Mr. Erhardt nor his campaign committee can use the term “reelect” on campaign signs. The facts surrounding any violation and the speed with which any violation may have been corrected goes to the issue of penalty.

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<sup>5</sup> Exhibit 2 (Affidavit of George Crolick)

<sup>6</sup> Minn. Stat. § 211B.34, Subd. 2.

<sup>7</sup> *Maddox v. Dept. of Human Services*, 400 N.W.2d 136, 139 (Minn. App. 1987).

As discussed at the hearing, the Administrative Law Judge will amend the caption to include both Mr. Erhardt and his campaign committee, which is named “the Ron Erhardt Volunteer Committee.”

The Administrative Law Judge concludes that based on the record presented, the Complainant has demonstrated probable cause to believe that Respondents violated Minn. Stat. § 211B.03. It is reasonable to require the Respondents to go to hearing on the merits and to allow a panel of three Administrative Law Judges to determine whether the Respondents violated Minn. Stat. § 211B.03, and if so, what penalty is appropriate. Should the Parties decide to waive the evidentiary hearing and submit the matter on the record made at the Probable Cause hearing with further written submissions, they must notify the ALJ by **12:00 p.m. on Monday, October 22, 2012.**

**J. M. C.**